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No. 81-2399
No. 82-358

# In the Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,
*Petitioners,*

*v.*

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
*Respondents.*

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UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
*Petitioners,*

*v.*

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
*Respondents.*

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 30, 1982

## QUESTION PRESENTED

Did the Court of Appeals correctly hold that the National Environmental Policy Act, 42 U.S.C. §4321, et seq., requires the Nuclear Regulatory Commission to consider the impact of reopening Three Mile Island Unit No. 1 on the psychological health of surrounding residents where (1) that impact is alleged to involve medically recognized damage to human psychological health in an area where such damage has already occurred as a result of the accident at Three Mile Island Unit 2, and (2) the impact is directly related to prior actual physical exposure to radiation and the prospect of future physical damage. */

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*/ All of the parties are listed in the caption of this Brief.

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# BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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People Against Nuclear Energy ("PANE") opposes the petitions for writs of certiorari filed in these cases.

## OPINIONS BELOW

The opinions and the judgment of the Court of Appeals are reported at 678 F.2d 222. They are reproduced in Appendix A to the petition filed by Metropolitan Edison Co., et al..[1/]

## JURISDICTION

The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. §1254(1) with respect to an Amended Judgment issued by the Court of Appeals on April 2, 1982 (Pet. App. 1-3a) and a modified version of that judgment entered on May 14, 1982 (Pet. App. 29a), which was incorporated in the opinions of the Court of Appeals, 678 F. 2d at 235-236 (Pet. App. 29a).

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1/ The petition filed by Metropolitan Edison Co., et al., in No. 81-2399 will be cited "Met. Ed. Pet.," and that filed by the Nuclear Regulatory Commission and the United States in No. 82-358 will be cited "NRC Pet." As the NRC has done, we will cite the Appendix to the Metropolitan Edison Co. petition as "Pet. App."

## STATUTE INVOLVED

This case involves the National Environmental Policy Act, 42 U.S.C. §4321, et seq. ("NEPA"). The pertinent provisions, Sections 2, 101 and 102, 42 U.S.C. §§4321, 4331, and 4332 are reproduced in Appendix F to the petition of Metropolitan Edison Co. (Pet. App. 109a).

## STATEMENT

On March 28, 1979, a serious accident occurred at Unit 2 of the Three Mile Island nuclear power plant ("TMI-2") in central Pennsylvania. It is the only incident in nearly three decades of commercial reactor operation so threatening to the public health and safety that public authorities recommended an evacuation. Tens of thousands of people left the surrounding area. The petitions before the Court seek a ruling that psychological health damage, "the major health effect" of

this unique event,[2/] should not be considered by the Nuclear Regulatory Commission ("NRC" or "the Commission"), in deciding whether to allow renewed operation of Three Mile Island Unit 1 ("TMI-1"), the undamaged twin of the crippled Unit 2. The petitions do not raise an issue that is worthy of consideration by this Court under the standards for granting certiorari review.

Construction of TMI-2 was authorized on November 4, 1969, after extensive safety review by the staff of the then Atomic Energy Commission and after the public hearing required by Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a). On April 4, 1974, the utilities that own TMI-2 applied for a license to operate the facility. After further extensive safety reviews by

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2/ Report of the President's Commission on the Accident at Three Mile Island - The Need for Change: The Legacy of TMI (October 1979) at 35, J.A. 267 (Hereafter "President's Commission Report"). "J.A." refers to the Joint Appendix filed in the court below.

the agency staff and a public hearing in which two citizens organizations and the Commonwealth of Pennsylvania participated, the Atomic Safety and Licensing Board authorized the staff of the Nuclear Regulatory Commission to issue an operating license after making all other findings necessary to assure reactor safety.[3/] The operating license was issued on February 8, 1978.[4/] TMI-2 entered commercial operation on December 30, 1978.

Despite the extensive safety reviews, TMI-2 suffered the nation's worst nuclear accident on March 28, 1979, just three months after it began commercial operation. The accident involved a sequence of events that had not been anticipated by the designers of

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3/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), LBP-77-70, 6 NRC 1185, 1186-87, 1228-31 (1977).

4/ 43 Fed. Reg. 7073 (February 17, 1978).

the plant and that was considered to be "incredible" by the NRC and the nuclear industry.

As the accident began, information was sketchy and confusing, and it appeared that the severity of the accident was not well understood. By Friday, March 30, 1979, the situation appeared to pose such a serious threat to the public health and safety that the Governor of Pennsylvania advised the unprecedented evacuation of pregnant women and preschool children within five miles of the reactor. Tens of thousands of surrounding residents left the area.[5/]

Fortunately, although the accident did involve substantial destruction of the reactor core and a minor release of radiation to the atmosphere, a disaster with massive

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5/ President's Commission Report at 13, 18, J.A. 259, 264.

radiation exposure was averted.[6] While the President's Commission on the Accident at Three Mile Island found that low levels of radiation "may result in the later development of cancer, genetic defects, or birth defects among children who are exposed in the womb," the President's Commission believed the radiation doses resulting from the TMI-2 accident to be so small that it would never be possible to detect physical health effects.[7] However, the President's Commission

> found that the mental stress to which those living within the vicinity of Three Mile Island were subject was quite severe.[8]

It concluded that

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[6] / Id. at 12, J.A. 258.

[7] / Id. at 12-13, J.A. 258-259.

[8] / Id. at 13, J.A. 259.

the most serious health effect of the accident was severe mental stress, which was short-lived. 9/

As a result of the accident at Unit 2, the NRC evaluated the status of Unit 1, which had been in operation for several years, but which, by coincidence, was not operating at the time of the accident. The Commission concluded on July 2, 1979, that it lacked

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9/ Id. Metropolitan Edison Co., et al., suggest at pages 18-19 of their petition that the psychological health damage caused by the accident at Unit 2 was caused largely by misinformation because the NRC misunderstood reported radiation levels and because there were reports of a possible hydrogen bubble explosion that never occurred. According to the utility, any psychological health damage is inconsistent with reality because it resulted from perceptions of danger that did not, in fact, exist. Commissioner Bradford dealt swiftly and thoroughly with this argument, noting that many mistakes in the assessment of the TMI-2 accident resulted in public statements that were unduly reassuring. He pointed out, for example, that in the early hours of the accident when all assessments and statements were reassuring, the reactor core was partially uncovered for several hours. At that time, the Commission was supporting actions by the utility that could have made the situation far more dangerous than the event that was actually in progress. Commissioner Bradford concluded that even if the projected possibility of a hydrogen explosion was incorrect, the danger was indeed very real for other reasons, and psychological

> the requisite reasonable assurance that the same licensee's Three Mile Island Unit No. 1 facility, a nuclear power reactor of similar design, can be operated without endangering the health and safety of the public.10/

On August 9, 1979, the Commission reiterated its order that TMI-1 remain in a cold shutdown condition, and it directed that an adjudicatory hearing be conducted prior to restart of the facility.11/ In instituting the hearing, the Commission invited briefs on the question of whether psychological damage related to the TMI-2 accident could be legally relevant to the proceeding.12/

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stress reactions "cannot be dismissed as irrational or unrelated to radiation hazard." Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-39, 12 NRC 607, 623, n. 7 (1980) (Pet. App. 96a-97a).

10/ 44 Fed. Reg. 40461 (July 10, 1979), J.A. 21.

11/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141 (1979), J.A. 22-32.

12/ Id. at 148, J.A. 29.

People Against Nuclear Energy ("PANE") was formed soon after the accident by local residents living within five miles of Three Mile Island. Most of the members of PANE had previously been generally apolitical or unconcerned about the nuclear plant in their midst. They now raised to the Nuclear Regulatory Commission their primary concern with respect to the restarting of Unit 1 -- the belief that restart would cause and perpetuate such serious psychological health damage and accompanying physical symptoms among the local population that it would be impossible to recover from the effects of the accident at Unit 2.[13/]

The Licensing Board for the TMI-1 restart hearing recommended that the Commission consider the effect of restart on the psychological health of local residents under

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13/ PANE's contentions are reproduced at Pet. App. 115a-116a. Only PANE's Contention No. 1, raising the issue of psychological health damage, is significant for purposes of the Court's review here.

the National Environmental Policy Act ("NEPA"),[14] but the Commission itself, by a 2-2 vote, rejected PANE's contentions.[15] Although the Commission later confirmed that result when a fifth Commissioner was appointed, a majority opinion was never issued.[16]

The United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision. (Pet. App. 1a-76a). The Court held that NEPA was intended to protect human health, that human health includes psychological health, and that NEPA

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14/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-8, 11 NRC 297 (1980), J.A. 63. (Hereafter "Board Certification").

15/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-39, 12 NRC 607 (1980) (Pet. App. 77a-100a).

16/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-81-20, 14 NRC 593 (1981) (Pet. App. 101a-102a).

applies to the sort of medically recognized psychological health damage alleged by PANE, as distinct from mere dissatisfactions arising from social, economic, or political concerns. (Pet. App. 16a-17a).[17] The Court's ruling is extremely narrow, relating only to the unique situation at Three Mile Island, where the existence of psychological health damage has already been recognized, and where it is directly related to the potential of a nuclear reactor to cause overwhelming damage to the human environment. (Pet. App. 15a).[18]

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17/ PANE had also raised the issue of the cognizability of psychological health damage under the Atomic Energy Act. The Court of Appeals upheld the Commission's ruling that it was not cognizable. Senior Circuit Judge McGowan accounted for the split decision, ruling that PANE's contentions are cognizable under NEPA but not under the Atomic Energy Act.

18/ The Court also held that a supplemental environmental impact statement would be required here if there now exist at Three Mile Island new circumstances or information on psychological health effects that were not considered in the original EIS. (Pet. App. 18a-26a). The correctness of this aspect of

Judge Wilkey dissented on three grounds. First, he argued that any psychological health damage would be caused by peoples' fears of federal action rather than by the federal action itself. According to Judge Wilkey, PANE is seeking to have the NRC consider simple fears about the operation

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the decision has not been challenged by either petitioner, although both note their disagreement with a broad reading of the Court's language to the effect that mere ongoing regulation triggers the application of NEPA. (Met. Ed. Pet. 7, n. 10; NRC Pet. 17, n. 12). We agree with the NRC that the broad language of the Court's opinion on this issue is dicta, and that the ultimate ruling hinges on the fact that the NRC is engaged in a specific proposal for federal action-restart of TMI-1. This is apparent not only from Judge Wilkey's dissent (Pet. App. 50a), but also from the majority's decision, which emphasized not only the fact that the NRC exercises general continuing supervision over TMI-1, but also the fact that the Commission now proposes to restart TMI-1 after having held that it lacked a reasonable assurance that the reactor could be operated safely. (Pet. App. 20a-21a). Since this proposal for federal action, the well established basis for the application of NEPA, would control even if the Court's broad language were invalid, review of that broad language would make no difference in the outcome of this case. Accordingly, the Commission is correct in its view that any questions allegedly raised by that language are not appropriate for certiorari review. This

of TMI-1 when reactor operation itself would have no significant impact on health. (Pet. App. 37a). Second, he doubted whether psychological health damage is sufficiently measurable to allow its consideration under NEPA. (Pet. App. 41a). Third, he asserted that the medically recognized psychological health damage alleged by PANE cannot be distinguished from less severe concerns or anxieties for purposes of determining whether NEPA applies (Pet. App. 42a-44a).

The most striking aspect of this case for purposes of deciding whether to grant certiorari is the complete absence of any facts in the record. PANE has never been given any opportunity to make even a threshold

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Court would have no reason to consider such matters, which the NRC acknowledges to be outside the scope of the questions presented, because their resolution is not "necessary for the proper disposition of the case." Piper Aircraft Co. v. Reyno, 102 S.Ct. 252, 261, n. 12 (1981).

showing with respect to any issue, although the opinions of both NRC Commissioners Ahearne and Hendrie opposing consideration of PANE's contentions (Pet. App. 79a-91a) and Judge Wilkey's dissenting opinion (Pet. App. 31a-59a) rely heavily on factual assumptions.[19/]

The only area in which PANE has been permitted to make anything approaching a factual record is on the issue of whether the alleged psychological health damage is sufficiently measurable and quantifiable to be considered under NEPA. On the basis of PANE's Preliminary Plan for Presentation of Evidence

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19/ In addition to the three factual assumptions discussed above with respect to Judge Wilkey's dissent, the unsupported factual assertions that have been relied upon by Judge Wilkey or Commissioners Hendrie and Ahearne to reject PANE's contentions include the following: (1) the proposition that it is not possible to mitigate the psychological health damage (Pet. App. 82a, 89a, NRC Pet. 24, n. 19), and (2) the proposition that the best way to alleviate the psychological health damage in the area is to assure that TMI-1 is safe when it is restarted (Pet. App. 79a, 82a-83a). See discussion at pages 55-62, infra.

on Psychological Distress and similar filings by other parties, the Licensing Board reached a threshold determination that this psychological health damage is sufficiently measurable.[20/] Ironically, PANE prevailed before the factfinding forum on the only issue on which any factual showing has been made, yet both the adverse Commission opinions and Judge Wilkey's dissent rely in part on their assumptions that this psychological health damage is not sufficiently quantifiable to be considered by the NRC.

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20/ J.A. 88, Board Certification at 302, n. 8, J.A. 68.

## REASONS THE PETITIONS SHOULD BE DENIED

The decision below meets none of the criteria for certiorari review. Contrary to the assertions of the petitioners, there is no basis for believing that the decision will apply elsewhere, that it will unduly burden federal agencies, or even that it will significantly burden the NRC in its consideration of TMI-1. The unique nature of Three Mile Island, the narrow scope of the decision, which the NRC itself has accepted, and the threshold requirements for raising NEPA issues will prevent widespread application of the decision to the NRC or other agencies.

There can be no conflict between this decision and those of other circuits since none has ever addressed this unique factual context or considered whether severe psychological health damage is cognizable under NEPA. To the contrary, the decision is

consistent with those emphasizing NEPA's central concern for the protection of human health. Indeed, the decision is consistent with the legal theory propounded in the Commission's petition, which asserts that any health damage must be proximately traceable to an impact on the physical or natural environment to be cognizable under NEPA. PANE believes that this psychological health damage is directly related to past physical impacts and to the prospect of similar damage or worse in the future, damage that the Commission concedes it must evaluate in its environmental impact statements. The Commission's petition raises the factual question of whether PANE is correct. Such a factual dispute is inappropriate for Supreme Court review prior to any consideration of the facts by the agency. In addition, the Commission's legal theory is incorrect. The decision below is entirely supported by the statute, the legislative

history, and the regulations of the Council on Environmental Quality.

Most important, this case arises in a posture wholly unsuited to Supreme Court review. Many factual questions beyond the expertise of counsel or the Court remain unanswered. It would be folly to venture into these uncharted waters until the parties have been given the opportunity to develop a factual record with which the Court can keep its bearings.

## I. This Case Does Not Involve An Important Issue Of Federal Law Worthy Of Supreme Court Review.

### A. The Decision Below Will Not Unduly Burden The NRC, The Federal Government In General, Or Even TMI-1 Itself.

Petitioners attempt to manufacture a basis for granting certiorari by asserting that the decision below would bring the federal government to a grinding halt by requiring agencies to consider psychological stress with respect to practically every

federal action imaginable. (NRC Pet. 27-29, Met. Ed. Pet. 15-20). These claims are baseless and transparently self-serving.

The ruling below is drawn very narrowly. In its own Statement of Policy, the NRC agrees that a narrow reading of the decision is correct.[21/] No other cases have arisen or been projected that would meet that test. And the threshold requirements established by this Court for determining NEPA applicability will prevent frivolous and unjustified consideration of alleged psychological issues.

The court below based its decision squarely and carefully on the distinctive character of the events at Three Mile Island. NEPA applies here because there is an impact on human health "in the wake of a unique and traumatic nuclear accident." The court emphasized that it applies because there are,

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21/ 47 Fed. Reg. 31762-31763 (July 22, 1982).

at TMI, "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." (Pet. App. 16a-17a). The only event that meets that description is the accident at Three Mile Island and the subsequent proposed restart of TMI-1. In more than a decade of litigation under NEPA, not one other case has involved a comparable threat to human psychological health, although the federal government has engaged in a broader range of activities in that time than in any previous decade in history, including the sorts of activities identified by the NRC as threatened by this decision. (NRC Pet. 28). The proposition that this decision would extend to such activities is inconsistent with the decision itself and is sheer speculation.

The NRC itself has issued a Statement of Policy adopting the view of the court

below concerning the narrow applicability of the decision:

> As the Commission reads the opinion, the cognizability of psychological stress impacts under NEPA thus hinges on three elements. First, the impacts must consist of "post-traumatic anxieties", as distinguished from mere dissatisfaction with agency proposals or policies. Second, the impacts must be accompanied by physical effects. Third, the "post-traumatic anxieties" must have been caused by "fears of recurring catastrophe". This third element means that some kind of nuclear accident must already have occurred at the site in question, since the majority's holding was directed to "post-traumatic" anxieties and by fears of a "recurring" catastrophe. Moreover, the majority clearly had only serious accidents in mind, because of the use of the word "catastrophe" and its references to the "unique" Three Mile Island Unit 2 accident. In the Commission's view, the only nuclear plant accident that has occurred to date that is sufficiently serious to trigger consideration of psychological stress under NEPA is the Three Mile Island Unit 2 accident. Accordingly, only this accident can currently serve as a basis for raising NEPA psychological stress issues.

* * *

> Psychological stress contentions which do not satisfy these criteria should be held inadmissible.

47 Fed. Reg. 31762-31763 (July 22, 1982) (Emphasis supplied). On the basis of this Statement, NRC hearing boards have rejected psychological stress contentions in every case where the board has reached a decision on the issue since the Statement was issued,[22/] and they will undoubtedly do so in all other cases except TMI-1. Contrary to the fears of Judge Wilkey (Pet. App. 27a-29a) and Metropolitan Edison (Met. Ed. Pet. 9), the NRC has been perfectly capable of handling its docket in a manner that avoids frivolous contentions or any undue burden. Only if an accident as serious as TMI-2

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22/ See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2) Dockets 50-440, 50-441 (July 19, 1982).

occurs elsewhere will the NRC or its hearing boards be required to address the issue.[23/]

Despite its agreement with the proposition that the decision below is to be applied very narrowly, the Commission now appears worried that some other court might disagree and require consideration of psychological health damage on a broader scale than intended by the D.C. Circuit. (NRC Pet. 27-28, n. 22). In effect, the Commission is telling this Court that while it believes that a correct interpretation of the decision below would result in a narrow application that would not extend beyond a TMI-2 type accident, it is worried that some other court may

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23/ Even if the Petitioners were correct in their assertion that psychological health damage could be made an issue in all licensing proceedings, there is no basis for a claim that this would unduly burden the agency. The NRC handles virtually all such generic issues through rulemaking proceedings, which need not involve more than consideration of written comments after a relatively brief notice period. State of Minnesota v. NRC, 602 F.2d 412, 416 (D.C. Cir. 1979), Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

misread the decision and require consideration of psychological health damage when it should not do so. We cannot say that such an errant court decision is impossible. However, it is not the function of this Court to intervene in order to ease the mind of a federal agency that is concerned about what today is an entirely abstract and hypothetical proposition. The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). Should that situation arise, Supreme Court review may then be appropriate.[24/]

In addition to the narrowness of the decision itself, the NRC and other federal

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24/ We understand that an intervenor in the Commission proceeding cited at n. 22, supra, has challenged the Commission's Statement of Policy in the Sixth Circuit as the result of the denial of the intervenor's psychological stress contention. Sunflower Alliance Inc. v. NRC, Docket No. 82-3563 (6th Cir., filed Sept. 13, 1982). If a conflicting or unduly burdensome decision is reached in that case, it may then be time for review here. Moreover, a Sixth Circuit decision denying the contention would reinforce the narrow applicability of the decision below and confirm that there is no need for Supreme

agencies are protected by threshold requirements for consideration of issues under NEPA. An issue need not be considered if it is frivolous or if it has not been shown to fall within the scope of the statute. As this Court emphasized in approving the NRC's refusal to accept a vague contention that the alternative of energy conservation should be considered in a nuclear plant licensing proceeding,

> it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). This standard is reflected in NRC regulations, which require that a prospective intervenor demonstrate a

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Court involvement. We note, however, that the intervenor was not dismissed from the licensing proceeding. Several of its other contentions were admitted, and it remains a party. Under firm precedent, the appeal is interlocutory and will be summarily dismissed upon motion by the Commission. Ecology Action v. U.S.A.E.C., 492 F.2d 998 (2d Cir. 1974).

"basis" for litigating a contention. 10 C.F.R. §2.714(b). Doubtless the court below recognized the need for that sort of threshold showing when it considered the previous occurrence of a nuclear accident at Three Mile Island to be significant in deciding whether psychological health damage is cognizable under NEPA with respect to the restart of TMI-1. (Pet. App. 16a-17a). The requirement for the previous occurrence of a traumatic event provides the NRC with a clear and rational means of determining whether psychological health damage should be considered. It also eliminates any basis for concern that parties might delay agency action by successfully embroiling the agency in endless litigation on insubstantial claims. Under Vermont Yankee, the requirement constitutes a reasonable framework for structuring intervenor participation in order to determine whether or not their issues should be heard. Implemented under these established

principles, the decision below would be applied only at Three Mile Island and at other reactors suffering catastrophic accidents in the future. That would not be an undue burden on either the NRC or the federal government in general.

Finally, the Court should be aware that the decision below should not delay a final NRC decision concerning TMI-1 restart past the date that the reactor itself is physically able to operate. The first order of the court below was issued on January 7, 1982. No one disputes that TMI-1 was not ready to go into operation at that time. Within the month, "operating officials at Three Mile Island announced that leaks and corrosion in thousands of steam generator tubes in TMI-1 would probably delay the restart for six to twelve months." (Pet. App. 27a). In their petition here, Metropolitan Edison Co., et al., have claimed that TMI-1 will be

ready for operation before the end of 1982. (Met. Ed. Pet. 6). However, more recent information indicates that even the utility believes restart will not be possible until at least early 1983.[25/] Until then, the decision below will have had absolutely no independent impact on the timing of restart of the reactor.

Very soon after the January 7 order, the Commission began its examination of the psychological health issue. It held a workshop with nationally recognized experts in the field on February 4-5, 1982,[26/] and it held meetings with the utility, PANE, and other interested citizens shortly thereafter. A number of studies of the psychological effect of the accident were carried out after it occurred, and we understand that the NRC

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25/ Harrisburg Patriot, August 25, 1982, at 23, col. 1.

26/ See Proceedings of the Workshop on Psychological Stress Associated with the Proposed Restart of Three Mile Island, Unit 1, NUREG/CP-0026, April 1982.

has been in contact with all of the scientists involved. It has had every opportunity to move expeditiously in order to make the determination required by the decision below. There is no justification for its failure to do so. There should be no reason that the Commission could not complete that effort and any further administrative proceedings that may be required, including a possible adjudicatory hearing, before the necessary repairs are completed at TMI-1. As Commissioner Gilinsky has said,

> The Commission should, by any reasonable standard, be able to decide this question by the end of this summer.27/

The end of the summer has now passed. It has become increasingly apparent that any delay in the possible restart of TMI-1 would not result from the actions required by the

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27/ Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-13, Docket No. 50-289 (Restart) (July 16, 1982), Separate Views of Commissioner Gilinsky.

court's decision below, but from the Commission's failure to act promptly and efficiently in taking those actions. Indeed, Commissioner Gilinsky has suggested that the Commission is delaying action precisely in order to preserve the case for review by this Court:

> The difficulty seems to be that the Commission is more interested in keeping PANE v. NRC a live controversy in order to justify Supreme Court review than in concluding the TMI-1 case.28/

It is inappropriate for this Court to burden its increasingly heavy docket with a case that presents hypothetical concerns such as those raised by Petitioners.

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28/ Id. Commissioner Gilinsky also expressed strong doubts that the decision below would have any adverse effect on nuclear power.

### B. The Decision Below Is Unique And Is Not In Conflict With Any Other Decisions Of The Courts Of Appeals.

Both Petitioners argue that the decision below "is contrary to decisions of every other court of appeals that has considered the issue," and with a decision of the District of Columbia Circuit. (NRC Pet. 24-27, Met. Ed. Pet. 10-15). They are incorrect. There can be no such conflict when no court of appeals, or district court for that matter, has ever before addressed the issue raised in this case.

The question here is whether NEPA governs medically and scientifically recognizable harm to human psychological health where there has been (1) previous actual exposure to radiation, (2) previous significant threat of massive damage to the physical environment from the same sort of federal action--approval to operate a nuclear reactor --that is now being proposed, (3) previous

damage to human psychological health, and (4) an acknowledgment by the Commission that the risk of massive damage to the physical environment in the future from reactor operation is sufficient to require consideration under NEPA.[29/] None of the cases discussed remotely approaches this situation. In particular, none involves an alleged threat to human health.[30/]

The cases cited as conflicting with the decision below fall into two categories.

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29/ See Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101, et seq. (June 13, 1980), in which the Commission determined, as a result of the TMI accident, that its environmental impact statements must henceforth include consideration of the environmental effects of accidents involving releases of radiation to the environment.

30/ By contrast, the decision below is supported by and consistent with decisions requiring the consideration of human health impacts under NEPA. See, e.g., Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908 (D. Ore. 1977); Sierra Club v. Coleman, 405 F. Supp. 53 (D. D.C. 1975); and National Organization for the Reform of Marijuana Laws v. U.S. Department of State, 452 F. Supp. 1226 (D. D.C. 1978).

The first category includes Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973), and Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973). These involve the siting of a correctional facility in a city, and an alleged influx of low-income workers to staff a postal facility. All use terminology such as "psychological factors," although none involves allegations of actual damage to human psychological health, as distinct from general concern or uneasiness.

The courts in Hanly and Richardson only questioned whether such vague psychological considerations are cognizable under NEPA. Neither court actually ruled on the point, and the Hanly court explicitly stated that it did not need to decide the issue. Hanly v. Kleindienst, supra, 471 F. 2d at 833;

First National Bank of Chicago v. Richardson, supra, 484 F.2d at 1380, n. 13. In the Maryland case, the court's reference to "psychological factors" was actually in the context of a discussion of aesthetic effects. Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, supra, 487 F.2d at 1038. The court was not faced with and did not rule upon any sort of psychological effect.

Moreover, to the extent that these courts expressed doubts about consideration of psychological factors, those doubts were based primarily on concerns about whether the factors are sufficiently measurable to be considered under NEPA.[31/] By contrast,

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31/ We note that the Commission, in quoting from Hanly, failed to continue the sentence and thus failed to inform this Court that the Second Circuit's doubts arose from concerns about whether psychological factors were sufficiently measurable. (NRC Pet. 25). By doing so, the NRC left the misimpression that the court had adopted the theory contained in the preceeding sentence of the NRC's petition. The court did no such thing.

in this case the Licensing Board has already reached a threshold ruling that the serious psychological health damage at issue here is sufficiently measurable to be considered by the Commission.[32/] More important, the question of whether the psychological health damage in this case is sufficiently measurable is one of fact for which this Court has no basis for judgment beyond the view of the Licensing Board.[33/] PANE would prove the measurability in considerably more detail if given the opportunity to do so.

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32/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-8, 11 NRC 297, 302 n. 8 (1980), J.A. 68.

33/ In addition to the measurability issue, the Richardson court questioned whether "public 'sensibilities'" about a jail would be cognizable in the absence of evidence that the safety of the neighborhood is actually threatened. 484 F. 2d at 1380, n. 13. It also emphasized that there had been no previous disturbances at the existing jail to give rise to legitimate concerns. This case does not involve mere public sensibilities, but an acknowledged threat to human health that arises from an actual prior physical threat and the prospect of such a threat in the future from the proposed action.

The second category of cases allegedly in conflict with this decision involves purely social or economic decisions to eliminate or reduce jobs, displace tenants from a building, or locate low income people in an area for job training or residential purposes. Breckinridge v. Rumsfeld, 537 F. 2d 864 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977); Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517 (5th Cir. 1978); Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982); Como-Falcon Community Coalition, Inc. v. Department of Labor, 465 F. Supp. 850, aff'd, 609 F.2d 342 (8th Cir. 1979), cert. denied, 466 U.S. 936 (1980); Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 255 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976). There was no hint in any of these cases of damage to human health, which is the issue here. None of these cases involved a previous actual and threatened physical impact on the

environment related to the concern raised by those parties, as is true here. And none involved a concern related to the prospect of further devastating impact on the physical environment arising from the same federal action that resulted in a prior physical impact. In at least one of these cases there was a factfinding in which it was determined that the issues involved social and economic impacts that would not significantly alter the character of the neighborhood. Como-Falcon Community Coalition, Inc. v. Department of Labor, supra, 609 F.2d at 346. No such fact finding has been permitted here.

Finally, both petitions rely heavily on Judge Wilkey's assertion that the majority's attempt to distinguish this decision is invalid because it is not possible to distinguish among psychological reactions so that "if NEPA embraces fears and anxieties in one [case], it must in all." (Met. Ed.

Pet. 14-15, NRC Pet. 26-27). Since Judge Wilkey could not distinguish among such reactions, he concluded that the cognizability of psychological effects under NEPA cannot be determined by the severity of the effect. Judge Wilkey was simply wrong as a matter of fact, and he rejected PANE's arguments largely on that factual basis, although we had never been given an opportunity to make our case. While Judge Wilkey, the Petitioners, and even this Court, as laypeople, may sense that any psychological reaction, including worry or fears concerning proposed jails or low-income residents, has an impact on psychological health, that is not the case as a matter of scientific fact. If allowed to, we would prove that such reactions do not involve impairment of health, while those at issue here are of an entirely different quality that are considered to be pathological and that do harm human

health.[34/] Medicine and science have recognized tools and standards for distinguishing genuinely ill people from those who are simply worried, or those who are malingering or acting for political reasons. It would be inappropriate and unwise for this Court to accept review based upon an alleged apparent conflict among the circuits when the situations of the cases are factually distinct on their face, and when this Court has no factual record from which to determine, as Petitioners suggest, that the distinction asserted by the majority below is invalid.

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34/ It is important to note that we would also demonstrate that the distinction often drawn between psychological and physical health is a wholly artificial one that is understandable for the non-scientific layperson, but that is entirely inaccurate. The concept of health involves the entire human organism, with mental and physical effects so interrelated that it is scientifically incorrect to draw a sharp distinction.

### C. The Commission's Argument On The Merits Depends On A Question Of Fact And Ignores The Statute, Legislative History, And Governing Regulations.

The primary argument of the Nuclear Regulatory Commission appears to be that the decision below should be reviewed because it is incorrect on the merits. The Commission's argument fails for two reasons. First, even under the unduly narrow interpretation of NEPA asserted in the Commission's petition, the decision below is correct as applied to the facts of this case. Second, the Commission is wrong on the merits. The decision below is fully supported by the statute, the legislative history, and the regulations of the Council on Environmental Quality.[35/]

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35/ In any event, the question of the validity of the decision below does not by itself justify a grant of certiorari unless there is an important question of federal law involved. Since the decision below will not have a widespread impact and does not involve a conflict among the circuits, it does not raise such a question.

1. The Commission's argument depends on a question of fact that is not appropriate for review in this court.

The Commission focuses on the term "environmental" impact in Section 102(2)(C)(i) of NEPA, 42 U.S.C. §4332(2)(C)(i), and argues that the psychological health damage here, no matter how serious, is not cognizable under NEPA because it is not "proximately traceable to the impact of the federal action on the natural and physical environment." (NRC Pet. 18-24). Assuming the Commission's legal theory is correct, the decision below is consistent with that theory, and the Commission has raised a question of fact that has not been addressed below and is not appropriate for consideration by this Court.

The population surrounding Three Mile Island is the only population in the nation that has been subjected to the physical reality of a nuclear reactor accident, including actual exposure to radiation that

may cause serious physical health effects, including genetic damage.[36] The restart of TMI-1 poses the risk of a further accident and further, perhaps greater, exposure to radiation--a direct physical impact of the sort required by the Commission's legal theory.[37]

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36/ See discussion, supra, at page 7.

37/ Metropolitan Edison Co., et al., claim that "the actual safety of TMI-1 was exhaustively considered in the restart hearing." (Met. Ed. Pet. 12, n. 12). They imply that the facility must therefore be considered safe such that an accident similar to TMI-2 in severity could not occur again. The NRC makes a similar point by arguing that the psychological health damage here arises from "political facts" distinct from the radiation or accident potential associated with plant operation. (NRC Pet. 22). The point of both arguments is that psychological health damage related to the restart of Unit 1 cannot be considered because there is no realistic probability of an accident. That may be a reasonable argument at other reactors, but it is not true at Three Mile Island. The people of that area were given exactly the same assurances based on extensive safety reviews before TMI-2 went into operation. Yet they were subjected to an entirely unexpected accident--previously considered "incredible" by the NRC and the nuclear industry--only three months later. This is not merely a political fact, but a physical reality. It is entirely reasonable of this population to expect a similar accident at TMI-1 even after the NRC gives its soothing assurances.

In the wake of the TMI-2 accident, the Commission itself has now recognized that its environmental impact statements must include consideration of accidents such as TMI-2, or worse, in which the public is exposed to releases of nuclear radiation.[38/] This is consistent with and required by substantial NEPA authority holding that an agency must consider the reasonably forseeable environmental consequences of its actions.[39/]

The court below took the risk of another accident into account when it based its decision in part on the fact that a nuclear accident involves the "holocaust potential"

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38/ See n. 29 at page 33, supra.

39/ See, e.g., Concerned About Trident v. Rumsfeld, 555 F.2d 817, 830 (D.C. Cir. 1977); Carolina Environmental Study Group v. U.S., 510 F.2d 796, 798-99 (D.C. Cir. 1975). In the latter decision, the court upheld the Commission's refusal to consider the consequences of serious nuclear accidents. As the Commission's recent reversal of that position, n. 29 and 38, demonstrates, the accident at TMI-2 has conclusively established that such an accident is forseeable to the extent that it must be considered under NEPA.

of enormous damage to the human environment. (Pet. App. 13a-15a). That holocaust potential, which the Commission itself now recognizes that it must consider in its environmental impact statements, is precisely the sort of impact on the natural or physical environment that the Commission argues must be the proximate cause of any psychological health damage to be considered under NEPA. Accordingly, the decision below is consistent with the Commission's legal theory.[40/]

The Commission's true argument here is not one of law, but of fact. The Commission believes as a matter of fact that any psychological health damage that might result from restarting TMI-1 is not proximately traceable to the physical impacts of restarting, which

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40/ Moreover, allowing restart involves the same physical impacts as issuance of a normal operating license. 10 CFR §51.5(a)(2) requires the preparation of an EIS prior to the issuance of any operating license.

include the risk of a future accident. PANE disagrees.[41/] However, the point here is not who is correct on this factual issue, but that this factual issue is central to the Commission's argument. There has been no record developed before the Commission or the court below. There is no basis for a reasoned decision by this Court. In this posture, this case is utterly inappropriate for consideration by the Supreme Court.

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41/ The NRC is incorrect in suggesting that PANE's allegation involves psychological health damage as a result of the mere existence of TMI-1 regardless of any environmental impact it might have. (NRC Pet. 20). It is the operation of TMI-1, carrying with it the potential for precisely the sort of physical impact that has already occurred in the TMI-2 accident (or worse), that gives rise to the psychological health damage. If PANE could be assured that TMI-1 would simply exist without ever operating again, the same health damage would not occur.

2. The decision below is consistent with and fully supported by the statute, the legislative history, and the governing regulations.

Not only does the Commission ignore the fact that the psychological health damage at issue here is directly related to past and reasonably forseeable physical impacts, its argument that such impacts are required to trigger NEPA is incorrect under the language of the statute and the express intent of the CEQ regulations.[42/] The Commission's reliance on the term "environmental" impacts at 42 U.S.C. §4332(2)(C)(i) ignores the scope of the statute. NEPA governs major Federal actions "significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C) (Emphasis supplied).

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42/ The Commission also cites several decisions of this Court in this discussion. However, none analyzes the scope of NEPA. They simply repeat the word "environmental" from the statute without examining its meaning in a manner useful to this case.

There is no language in NEPA that will support limiting consideration of human environmental impacts to impacts on the natural or physical environment. Indeed, the word "physical" does not appear at all.

The essential purpose of NEPA is to improve and protect the harmony between man and his overall environment. As Senator Jackson noted,

> An environmental policy is a policy for people. Its primary concern is with man and his future.

115 Cong. Rec. S17451 (daily ed. December 20, 1969), reprinted in I Legislative History of the National Environmental Policy Act of 1969 at 495 (1970) (hereafter "Legislative History"). More important with respect to this case, Senator Jackson strongly emphasized the intended broad scope of NEPA:

> A national policy for the environment is thus above all else a national policy for the welfare and survival of man.

* * *

> A national environmental policy would . . . necessarily be concerned with natural resource issues. But the total environment needs of man--ethical, esthetic, physical, and intellectual, as well as economic--must be taken into account.

115 Cong. Rec. S1784, 1787 (daily ed. February 18, 1969), I Legislative History at 394, 397.[43/]

This emphasis on a broad understanding of the scope of NEPA is reflected not only in the reference to "human environment,"

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43/ The Commission cites other remarks of Senator Jackson, in which he provided a comprehensive list of perceived environmental matters to be governed by NEPA, for the proposition that all environmental impacts, including psychological health damage, must be "rooted in a discernable impact upon the natural or physical environment." (NRC Pet. 22-23, n. 18). The language cannot be stretched that far. Senator Jackson's reference to "conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being" is not by its terms limited to physical conditions. Neither are "faltering and poorly designed transportation systems" or "poor architectural design and ugliness" impacts on the physical or natural environment. They reflect a broad concern with the overall quality of the human environment in all of its aspects, and particularly concerns with improving the quality of human life in the context in which we live.

but also throughout the statute. For example, it is the intent of NEPA to

> encourage productive and enjoyable harmony between man and his environment,

42 U.S.C. §4321, and to

> assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.

42 U.S.C. §4331(b)(2).

The Commission notes that this broad understanding of the human environment was adopted by the Council on Environmental Quality, but the Commission attempts to argue that CEQ would not consider health effects to be cognizable under NEPA unless they were traceable to the impact of Federal action on the natural and physical environment. (NRC Pet. 19-20, n. 14). The Commission is absolutely incorrect. The regulations in question, 40 C.F.R. 1508.8 and 1508.14, establish that the "effects" of Federal actions governed by NEPA include effects

on human health, and that the term "human environment" is to be "interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." Contrary to the position taken by the Commission, CEQ clearly stated in the preamble when it issued these regulations that it did not intend to limit the term human environment as the Commission wishes:

> A few commenters expressed concern that this definition could be interpreted as being limited to the natural and physical aspects of the environment. This is not the Council's intention.

43 Fed. Reg. 55988 (November 29, 1978).[44/]

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44/ Both that preamble and section 1508.14 itself exclude "economic or social effects" from the class of effects that trigger the application of the EIS requirement. Under normal canons of construction, CEQ did not intend to extend this exclusion to any other types of effects. Id. at 55988-55989. CEQ did not equate human health effects with economic or social effects. Although CEQ included health effects in section 1508.8 as among the effects governed by the statute, it did not specifically list them in the exclusion language of section 1508.14 on which the Commission relies.

The Council's inclusion of health effects as environmental effects that trigger NEPA is consistent not only with the emphasis on benefiting human beings, as demonstrated by the statutory and legislative material cited above, but also with the emphasis throughout the statute on the protection of human health. Under 42 U.S.C. §4321, one of the purposes of NEPA is to "stimulate the health and welfare of man." In Section 101(c) of NEPA, 42 U.S.C. §4331(c), Congress explicitly recognized

> that each person should enjoy a healthful environment . . . .

Indeed, Judge Wilkey recognized that "NEPA's requirements extend to effects on human health" (Pet. App. 35a), and at least one court has stated that

> No subject to be covered by an EIS can be more important than the potential effects of a federal program upon the health of human beings.

Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 927 (D. Ore. 1977).

This case involves a significant impact on human health that would be caused by altering the human environment of the Three Mile Island area through the restart of TMI-1. The distinguishing feature of that human environment is the existence of a population that has been traumatized by the accident at Unit 2 and that would be seriously threatened with additional and permanent psychological health damage if Unit 1 were reopened. Three Mile Island Unit 1 is part of that human environment. Restart of that reactor would significantly affect the human environment of that area by significantly altering the psychological context for local residents and causing widespread damage to human health, one of the primary concerns of NEPA.[45/] This is precisely the sort of

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45/ The fact that this health damage derives from an alteration of the human environment is most clearly

relationship between people and their environment that is referred to in the CEQ regulations.[46/] 40 C.F.R. §1508.14. It is also precisely the sort of situation in which CEQ did not intend to limit NEPA to purely physical impacts.

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illustrated by the fact that if people were to move away--to a different human environment--they would not suffer the same damage to their health upon the restart of TMI-1.

46/ This situation is also completely unlike the example posed by the Commission, in which the Food and Drug Administration acts to approve the sale of drugs that affect human health. (NRC Pet. 21, n. 16). The action of the FDA does not affect the human environment of any particular area or community, either physically or psychologically. It does not serve to define or to alter the area in which we live, either locally or nationally. It also does not involve the potential for actual physical impacts of "holocaust" proportions on the environment, which was a primary concern to the court below. It is a distortion of the decision below to suggest that its logic could be applied to FDA. Nonetheless, it should be noted that at least the FDA examines the health impact of its actions before it takes them; that is the essence of its statutory mandate. That is precisely what the NRC is trying to avoid here with respect to what is acknowledged to be the only significant human health impact to date of the TMI-2 accident.

## II. The Facts Have Been Inadequately Developed To Allow Proper Consideration By This Court.

We have previously emphasized the lack of any factual record on which the court below or this Court could base conclusions concerning a broad range of disputed issues.[47] The majority reached its decision based on our allegations. This approach, which is closely analogous to summary judgment treatment of an issue, is the correct one in a case such as this where no factual record exists. This treatment is particularly appropriate with respect to determining whether an issue is cognizable under NEPA since a properly supported allegation is sufficient to require agency consideration. Foundation for North American Wild Sheep v. U.S. Department of Agriculture, 681 F.2d 1172, 1177-78 (9th Cir. 1982). By contrast, Judge Wilkey and the petitioners here rely

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47/ See discussion, supra, at 14-16.

heavily on factual assertions for which there is no record support and which are outside the expertise of either the Petitioners, the court below, or the Supreme Court. In light of the widespread influence that a Supreme Court decision in the area of psychological health would have not only with respect to NEPA, but with respect to all areas in which psychological health is addressed, it is vitally important that the Court withhold consideration of the issue until the factual record has been fully developed.

The major disputed factual issues here fall into two categories, those that bear on the substantive question of the scope of NEPA, and those that purport to support arguments that the decision below will have widespread applicability and pose an undue burden on the federal government.

The major factual issues in the first category are:

(1) The question of whether serious psychological health damage is nonetheless so difficult to measure or quantify that it is not cognizable under NEPA. (Pet. App. 40a-41a, Met. Ed. Pet. 11-12, 17-18). The Licensing Board made a threshold finding that it is measurable, but Judge Wilkey would have ruled it is not.

(2) The question of whether there is a distinction between minor psychological conditions such as worry or fear and those alleged here, involving threats to human health. Judge Wilkey seems to believe that there is an unbroken continuum such that the applicability of NEPA cannot be based on the severity of a psychological condition. (Pet. App. 41a-44a). Although that proposition may seem logical to a layperson, it is incorrect. We would prove the contrary.

There is a distinction between a fear reaction to the location of a jail and the pathological conditions that exist at Three Mile Island and that would be caused by the restart of TMI-1,

(3) The Commission emphasizes the importance of mitigation under NEPA and cites Commissioner Hendrie for the proposition that mitigation is not possible in the area of psychological health damage. (NRC Pet. 24, n. 19). In the alternative, Commissioner Hendrie has argued that the best way to mitigate the psychological health damage is by assuring the safety of the reactor. (Pet. App. 83a). Commissioner Hendrie has no training in this area, and there

is no record support for these claims. We expect to prove the contrary, particularly that there are a number of actions that could be taken to mitigate the health damage tc some degree.

The major factual assertions relied upon to argue that the decision below would have widespread impact are:

(1) The proposition that "any special interest group . . . could whip up sufficient hysteria" to create psychological health damage that would trigger the applicability of NEPA under the majority's decision. (Pet. App. 38a, Met. Ed. Pet. 18). The claim is incorrect. We would show the contrary if allowed to make a factual record. There is a qualitative distinction between political concerns that might be created by a special interest group and the health concerns at issue here.

(2) The proposition that the health effect here is caused by mere fear rather than by the federal action itself.[48/] (Pet. App. 37a, Met. Ed. Pet. 18-19). This grossly oversimplifies reality. The existing psychological damage in the area is a health reaction that is not necessarily related to prior fears or opinions about nuclear power. The psychological damage related to restarting Unit 1 arises primarily from the psychological vulnerability caused by the accident at Unit 2. Mere fears that exist in other areas are not of the same character as the psychological vulnerability at Three Mile Island.

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48/ Judge Wilkey also appears to assume that human health does not encompass psychological health when he argues that PANE would have the NRC consider fears of TMI-1 regardless of the effect of the reactor on human health. (Pet. App. 37a). This reasoning is circular. If human health encompasses psychological health, as this Court has consistently held, United States v. Vuitch, 402 U.S. 62 (1971), restarting TMI-1 does affect human health.

In these and other areas, this Court has no factual record to guide its consideration. If it were to accept this case, it would be forced to speak from ignorance on several issues. It would risk issuing a decision that was profoundly in error in its underlying factual assumptions. Yet that decision would undoubtedly influence the development of the law related to psychological health not only under NEPA, but also in the areas of tort litigation, criminal defense, and all others where related questions might arise.

The NRC is in the process of developing a factual record. We hope to prove that the factual assumptions stated above are inaccurate and to provide material that would allow the NRC or a court to reach reasoned conclusions consistent with current scientific knowledge. In this situation the Court should not grant certiorari. It should wait while the facts are developed. If Supreme

Court review of this issue is ever requested again, there may then be a record for decision.

As we have argued, supra, p. 19-31, this issue will arise only in the rarest and most extraordinary circumstances. We expect the Sixth Circuit, in the litigation noted earlier at n. 24, to reject the proffered contention in that case for the reasons stated in the Commission's Statement of Policy and supported by the decision below. That event will confirm our arguments here. If we are wrong, and the Sixth Circuit accepts the contention, or if it issues an opinion that conflicts with the decision below, then the time may be right for Supreme Court review. That is not the case today.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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